Supreme Court, U. S.
FILED
AUG 31 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A & G SALES, SYLPAC and S.A.M. INDUSTRIES, INC., *Petitioners,*

vs.

GTE SYLVANIA INCORPORATED, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT GTE SYLVANIA INCORPORATED IN OPPOSITION

RICHARD E. GUGGENHIME
M. LAURENCE POPOFSKY
RICHARD L. GOFF
44 Montgomery Street
San Francisco, California 94104
Telephone: (415) 981-5000
Attorneys for Respondent

HELLER, EHRMAN, WHITE & MCAULIFFE
44 Montgomery Street
San Francisco, California 94104
Telephone: (415) 981-5000
Of Counsel

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes involved	3
Counterstatement of the case	3
(a) Background and competitive purposes	4
(b) Sylvania's locations practice	5
(c) Competitive effects	6
(d) Sylvania-Continental business relationship	8
(e) Jury instructions	9
(f) Ninth Circuit proceedings	10
Argument	10
I. The Court of Appeals holding is correct and does not conflict with Schwinn	10
A. Economic freedom and the exclusive dealing precedents	13
B. Judicial economy and stare decisis	15
II. The opinion below does not conflict with decisions in other courts	19
Conclusion	23

Table of Authorities Cited

Cases

Adolph Coors Company v. F.T.C., 497 F.2d 1178 (10th Cir. 1974), cert. denied, 419 U.S. 1105 (1975) 23

Boro Hall Corporation v. General Motors Corporation, 124 F.2d 822 (2d Cir. 1942), cert. denied, 317 U.S. 695 (1943) 19

Chicago Board of Trade v. United States, 246 U.S. 231 (1918) 13

Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975) 23

Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir. 1973) 22

Jos. E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970) 13

Kaiser v. General Motors Corporation, 530 F.2d 964 (3d Cir. Feb. 10, 1976), aff'g 396 F.Supp. 33 (E.D. Pa. 1975) 20

Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958) 16

Reed Brothers, Inc. v. Monsanto Company, 525 F.2d 486 (8th Cir. 1975), cert. denied, 46 L.Ed. 645 (U.S. 1976) 22

Salco Corporation v. General Motors Corporation, Buick Motor Division, 517 F.2d 567 (10th Cir. 1975) 19, 20, 21

United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) .....3, passim

United States v. Arnold, Schwinn & Co., 291 F.Supp. 564 (N.D. Ill. 1968) 4

United States v. Colgate & Co., 250 U.S. 300 (1919) 6

United States v. General Motors, 384 U.S. 127 (1966) 20

United States v. Topco Associates, 405 U.S. 596 (1972) ..17, 18, 20

White Motor Co. v. United States, 372 U.S. 253 (1963) ... 16

Codes

Page

California Civil Code Sections 1790 et seq. 22

Statutes

28 U.S.C. Section 1254(1) 2

Texts

1968 Antitrust Law Symposium of the New York State Bar Association, 64 14

Baker, Vertical Restraints in Times of Change: From White to Schwinn to Where, 44 Antitrust L.J. 537 (1975) 18

Elman, Petrified Opinions and Competitive Realities, 66 Colum. L. Rev. 625, 627 (1966) 17

Phillips, Schwinn Rules and the "New Economics" of Vertical Relations, 44 Antitrust L.J. 573 (1975) 19

Pollock, The Schwinn Per Se Rule: The Case for Reconsideration, 44 Antitrust L.J. 557, 586 (1975) 14, 18

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A & G SALES, SYLPAC and S.A.M. INDUSTRIES, INC., *Petitioners,*

VS.

GTE SYLVANIA INCORPORATED, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENT GTE SYLVANIA INCORPORATED IN OPPOSITION

After eleven years of litigation including five years of appellate proceedings, the majority of the Court of Appeals for the Ninth Circuit, sitting *en banc,* has correctly held that the legality of vertical locations agreements unaccompanied by price fixing, customer allocation or similar trade restraints, is properly tested under the rule of reason. Respondent GTE Sylvania Incorporated (hereinafter "Sylvania") submits that the holding below is amply supported by antitrust and economic doctrine and is con-

sistent with all pertinent authority. Accordingly, the Petition for Writ of Certiorari should be denied.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A-1-114)[1] is presently unreported. The verdict of the jury in the District Court in the form of answers to special interrogatories is not reported but partially quoted at Pet. App. A-11-12, fn. 6. After rendition of the jury verdict the District Court entered contested findings of fact and conclusions of law which are not reported (Pet. App. B-115-129). The status of these findings is discussed in the majority opinion at Pet. App. A-13, fn. 7.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1976. The Petition for Writ of Certiorari was docketed on July 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

While the petition both trifurcates and obscures the question presented, the single issue is the following:

> Did the Court of Appeals err in holding that a distribution system entailing vertical agreements between a manufacturer with a small market share and its direct buying retail dealers specifying the locations from which the latter are authorized to sell brand-named products is to be adjudged under the rule of reason rather than under a doctrine of *per se* illegality derived from *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)?

[1] "Pet. App." refers to the appendices to the Petition for Writ of Certiorari.

STATUTES INVOLVED

The pertinent statutory provisions are set forth at Pet. App. C-130-133.

COUNTERSTATEMENT OF THE CASE

As petitioners would have it, this protracted controversy involves, not the legality of locations agreements, but the refusal of the majority below to apply the *Schwinn* rule of *per se* illegality to "territorial restraints" squarely within that rule's ambit. But while the superficial similarities between the Sylvania practice and that condemned in *Schwinn* are obvious, it is the differences which frame the question presented. For this record establishes that Sylvania's practice of designating the location at which its retail dealers are authorized to sell Sylvania brand merchandise involves no restriction upon the customers to whom or the territories into which a franchised dealer might advertise, sell or deliver Sylvania products. While economic considerations doubtless limit the competitive capabilities of a particular dealer operating at an approved location, the practice was conceived and implemented with pro-competitive objectives and effects comparable to those which accompany the traditionally lawful exclusive distributorship. As such, it

is the kind of practice specifically recognized as lawful by the decree on remand in *Schwinn* itself. 291 F.Supp. 564, 566 (N.D. Ill. 1968).

While the pertinent facts are fully and fairly set forth in the majority opinion below (Pet. App. A-2-16), petitioners' distortions make it necessary to submit the following summary as a counterstatement.

(a) Background and competitive purposes.

This action arises out of 1964-1965 business relationships between Sylvania, a manufacturer of television products, John P. Maguire & Co., Inc. ("Maguire"), a corporation engaged in financing the inventory acquisition of Sylvania products by franchised Sylvania dealers, and Continental T.V., Inc. and affiliates, a Northern California retailer of Sylvania and competing products. Suit was commenced by Maguire[2] to collect amounts due and unpaid by Continental under promissory notes and trust receipt contracts.[3] Continental's response to Maguire's debt collection suit was a cross-claim against Maguire and Sylvania for alleged violations of the antitrust laws.

So far as here pertinent, Continental's antitrust claims focused on Sylvania's "elbow room policy" conceived and implemented in 1962 as a competitive response to a disastrous market position. Prior thereto, Sylvania attempted to maintain a "saturation" type distribution system in-

[2]The petition errs in stating that Sylvania filed the suit. (See Petition, p. 3)

[3]Judgment in favor of Maguire in the sum of $145,000 as principal, prejudgment interest, costs and attorneys' fees, was subsequently entered.

volving the sale of products to independent or company-owned distributorships without reference to locale and limited only by the distributor's ability to pay. By the late 1950s Sylvania's national market share had deteriorated to 1 or 2 percent. With the introduction of color and the concomitant increase in production and distribution costs, Sylvania was confronted with the stark choice of either improving its competitive position through a different distribution technique or going out of the business of producing and selling television and related products. (Pet. App. A-pp. 2-5; *pace* Petition, p. 5). Sylvania's solution was to adopt a franchise concept of limited rather than "saturation" distribution designed to attract select dealers willing to hold themselves out as authorized Sylvania outlets.

(b) Sylvania's locations practice.

The new distribution system involved a phase-out of wholesale distribution in favor of direct factory-retailer sales to "franchisees" operating from approved locations. Under this system Sylvania reserved to itself the right to determine whether it would sell to a particular retailer for resale as an authorized Sylvania dealer at a designated location. This was true whether or not a particular dealer was authorized to sell Sylvania products at one or more locations. Put simply, a dealer authorized *somewhere* as a Sylvania franchisee was not authorized *everywhere;* Sylvania did not franchise chains as such.

The policies employed in implementing Sylvania's locations practice may be briefly enumerated (Pet. App. A-p. 5-6):

1. No franchisee or dealer had the right to veto Sylvania's determination with respect to approval of

another franchise location in a particular market area; Sylvania made its determination to franchise or not with reference to such factors as market penetration and quality of prospective dealer, but without consultation with its existing authorized dealers.

2. While the purpose of the "new policy" was to "space" dealer locations, Sylvania at no time entered into any agreements or understandings restricting the freedom of an authorized Sylvania dealer operating from the franchise location to sell to anyone wherever situated.[4]

3. Sylvania encouraged its authorized dealers to handle competing lines, including RCA, Zenith, Philco and other major brands, and entered into no understandings or agreements limiting a dealer's independent choice with respect thereto.

4. Sylvania did not engage in any understandings or agreements whereby a particular dealer was afforded an "exclusive"; at all times Sylvania reserved the right to authorize a Sylvania dealer to function in an area in competition with an existing dealer.

(c) Competitive effects.

From 1962 to 1965 Sylvania was able to expand its market share to approximately 5 percent nationally and sus-

[4]Although Sylvania contended at trial that its locations practice was unilateral in character (see *United States v. Colgate & Co.*, 250 U.S. 300 (1919), the jury found otherwise. Accordingly, the proceedings on appeal have been pursued on the premise that Sylvania's locations practice in Northern California in 1965 involved agreements between Sylvania and its dealers impliedly restricting the latter's ability to transship inventory owned by them to new locations for resale as Sylvania dealers without Sylvania's prior approval. See Pet. App. A-5, fn. 4.

tain itself as an effective competitor in a television market dominated by RCA and Zenith. In the opinion of Sylvania management its revival as an interbrand competitive factor was a direct result of its new distribution policies. (Pet. App. A-6)

Sylvania's success was particularly striking in the greater Sacramento area where its market share exceeded 10 percent in 1965. While one retail dealer, Handy Andy, enjoyed the largest share of the Sacramento business, other franchised dealers operating from locations in suburban Roseville and Woodland—locations well within the 25-50 mile radius of practical marketing—guaranteed effective competition in the Sylvania line in the Sacramento market area.

Market shares aside, during 1964-1965 Sylvania's locations practice resulted in fewer but select dealers competing in the Northern California area with at least two or more such authorized dealers serving every metropolitan market larger than 100,000 in populace. In all relevant Northern California areas, there were a large number of dealer outlets and available brands.[5] Sylvania's location practice thus imposed no meaningful restriction on customer choice.[6] Nor did it have any adverse impact on prices or volume: throughout the relevant period there

[5]For example, in Sacramento in 1965 there were approximately 100 retail dealers and approximately 25 brands on the market.

[6]Both at trial and now in the petition, p. 4, fn. 1, Continental cleaves to a phrase in an early intracompany manual for salesmen which referred to "elbow room" as eliminating same brand competition. But as all of the witnesses recognized, this language was essentially inaccurate in view of the fact that the locations practice—while concededly limiting the *number* of intrabrand competitors—was never applied in Northern California in such a way as to prohibit competition.

was a steady increase in volume and decrease in prices, both for Sylvania merchandise and in the television market generally.

(d) Sylvania-Continental business relationship.

Relationships between Continental and Sylvania were both meteoric and stormy. (See Pet. App. A-6-12). Having commenced in May 1964, they all but ruptured in July 1965 when Sylvania declined to accede to Continental's demand that Sylvania refuse to franchise a competitor of Continental in the San Francisco area. Continental thereupon cut back both its purchases and its payments. Pet. App. A-8.

As autumn approached Sylvania's credit department became increasingly concerned with Continental's late payments for merchandise and related defaults in its financial obligations. To cap matters, in late August 1965 Sylvania's headquarters credit personnel learned for the first time that Continental's principal shareholder and president previously had been convicted of three offenses involving the writing of bad checks and misappropriation of government funds. As a consequence, on September 16, 1965 Sylvania reduced Continental's credit limit from $300,000 to $50,000. Pet. App. A-9-10.

Continental reacted to the credit cut by withholding all payments owing to Maguire for Sylvania merchandise. At about the same time Continental elected to move Sylvania brand merchandise from one of its authorized locations to a newly opened Sacramento facility. Continental coupled this movement with a request to Sylvania's field personnel for an immediate grant of a franchise for the new store. When this request was refused Continental continued to sell the Sylvania-brand goods in Sacramento while declining to pay for any merchandise subject to the Maguire financing arrangements. Pet. App. A-8-9.

When Continental's accumulated debt reached some $62,000, unsecured by merchandise, Maguire filed this action and Sylvania notified Continental that its franchise as a Sylvania dealer was terminated. Pet. App. A-10-11.

(e) Jury Instructions.

At trial Continental claimed that the damages it suffered following the rupture of relationships was proximately caused by Sylvania's adoption and enforcement of its locations practice. While Sylvania contended otherwise, it also argued that if the legality of that practice were dispositive, then the practice should be evaluated by the jury under appropriate rule of reason instructions. But the District Court rejected that view in favor of a *per se* rule: it specifically charged the jury that any effort by Sylvania "to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania" would be a violation of the antitrust laws "regardless of the reasonableness of the locations restrictions."[7] As the majority below observes,

---

[7]Petitioners suggest that the trial court's instructions simply put to the jury the question of whether Sylvania had imposed a territorial restraint of the kind struck down in *Schwinn* and advised the jury that, if so, Sylvania's restraint was illegal *per se*. (Petition, p. 6, citing to the dissent). While it is fair to say that the jury instructions were ambiguous in many respects, it is nonetheless clear that the jury was charged that Sylvania's locations practice, if implemented by vertical agreements, was illegal *per se*. This prejudicial instruction was reversible error regardless of whether other instructions—including some drawn from Sylvania's rule of reason proposals—were correct. The majority below accurately interpreted the critical instruction as a *per se* condemnation of locations agreements. (Pet. App. A-14-16).

a verdict against Sylvania was thus "virtually assured". (Pet. App. A-15)

(f) Ninth Circuit proceedings.

By a 7-4 majority the Court of Appeals for the Ninth Circuit reversed the District Court's judgment and equitable decree entered in favor of Continental and remanded the case for a new trial. It concluded that the District Judge, the Honorable Associate Justice Tom C. Clark (Ret.), sitting by designation, erred in applying a *per se* rule derived from *Schwinn* to the challenged Sylvania practice. That holding made it unnecessary for the Ninth Circuit majority to address Sylvania's additional assignments of error, namely, (1) that even if Sylvania's locations practice could be held illegal *per se* under *Schwinn,* Sylvania was wrongfully denied the benefit of, and jury instructions respecting, the "failing company" defense; and (2) that even if this Court's 1967 opinion in *Schwinn* renders a locations practice illegal *per se,* that rule should not be applied retroactively to Sylvania's 1964-5 conduct. Pet. App. A-53, fn. 41. Sylvania has pursued these defenses throughout and preserves them here.

ARGUMENT

I. THE COURT OF APPEALS HOLDING IS CORRECT AND DOES NOT CONFLICT WITH SCHWINN

For petitioners, analysis of the legality of locations agreements begins and ends with *Schwinn.* Dismissing the differences between the Sylvania and Schwinn distribution systems as "trivial", petitioners argue that *Schwinn* mandates *per se* illegality for all "vertical resale re-

straints which effectively segregate resellers into separate geographical markets." Petition, pp. 11-12. Erroneously postulating that Sylvania's location practice effects such a segregation, petitioners claim that a writ must issue in order to insure the continued validity of *Schwinn.*

But this Court's decision in *Schwinn* was more discrete in application than petitioners suggest. The restrictions declared illegal in *Schwinn* (1) prohibited wholesalers from selling bicycles outside of specifically drawn exclusive territories, and (2) prohibited both wholesalers and franchised retailers from selling to any but designated classes of customers. This set of rigid contractual restrictions yielded this Court's holding that it is *per se* unlawful "for a manufacturer to seek to restrict and confine *areas or persons* with which an article may be traded after the manufacturer has parted with dominion of it . . ." 388 U.S. at 379; (emphasis added).

The vice condemned in *Schwinn* was thus the rigid compartmentalization of the distribution system into separate units effectively isolated from all intrabrand competition. Sylvania's locations practice differs materially. Pet. App. A-44. Here, there was no contractual restraint upon the territories into which or the customers to whom franchised dealers might resell. A franchised dealer was contractually free to advertise, sell or deliver Sylvania products to anyone in any territory it might choose with economic practicality providing the only limitation. And in every metropolitan area in Northern California—including Sacramento—customers had a choice among competing Sylvania dealers who were located within the 25-50 mile radius in which volume selling was feasible. Any dealer who

might be inclined to charge too high a price or provide poor service was always subject to a meaningful intrabrand competitive check—a check heightened by the fact that Sylvania at all times reserved the right to franchise additional dealers free of any "veto" power at the dealer level. Pet. App. A-20-1; 45-7.

It is, of course, plain that Sylvania's locations practice had the purpose and effect of limiting the *number* of Sylvania dealers who might engage in intrabrand competition to that determined desirable by Sylvania.[8] Nor is it disputable that a dealer's ability to compete in territorial terms is necessarily conditioned by such factors as its financial capacity, volume, profit margins, selling methods and the like. But similar limitations upon intrabrand competition and upon dealer territorial capabilities likewise inhere in such distribution practices as exclusive dealerships, area of primary responsibility covenants and profit pass-over requirements—practices which have been generally recognized as lawful in non-monopoly situations after *Schwinn*. (See Pet. App. A-33-44).

Rather than stifle competitive market forces, Sylvania's locations practice served legitimate pro-competitive objectives. The uncontradicted evidence shows that Sylvania's pre-1962 use of "saturation" distribution proved so unsuccessful that Sylvania was faced with the prospect of going out of the television business entirely. Sylvania concluded that a "spaced" distribution system of select, high-volume

[8]It is useful to observe that insofar as the practice involved the denial to an existing dealer of a franchise to sell products in a new location such as Sacramento, it had no greater effect upon competition than lawful refusal to grant a franchise to a completely new dealer.

dealers who would vigorously promote the line was its only means of remaining a viable interbrand competitor. By limiting the number and proximity of franchised outlets Sylvania was able to offer a marketing area and potential clientele from which its dealers could obtain a reasonable rate of return upon their investment of time, effort and money. This technique enabled Sylvania and its dealers to become effective and vigorous competitors in the interbrand market for television products. As the majority below perceives, nothing in *Schwinn* dictates that these pro-competitive purposes and effects be disregarded. However much petitioners may castigate the Court below for declining to place Sylvania's locations practice in the *Schwinn* mold, it did so for good and substantial reasons.

Petitioners' remaining attacks upon the majority opinion involve an attempt to avoid the exclusive dealing precedents and an appeal to *stare decisis*. Both warrant brief response:

A. Economic freedom and the exclusive dealing precedents:

All contracts restrain, as Justice Brandeis noted in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). Nonetheless, petitioners urge review of Sylvania's locations practice because it contractually deprives "independent retailers of the power to act for themselves" thereby offending "a vital social goal of the Sherman Act." Petition, p. 13. This thesis, which echoes Judge Browning's dissent below (Pet. App. A-88-90), is fleshed out in petitioners' discussion of the exclusive dealing precedents, notably *Jos. E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). Such authorities, it is said, are dis-

tinguishable because they involve only self-imposed inhibitions upon a manufacturer's own sales decisions—not resale restrictions upon independent dealers. (Petition, p. 17)

But petitioners' argument is surely misconceived. In contractual terms, the traditional exclusive distributorship involves limitations upon the manufacturer's "economic freedom" every bit as "restrictive" as that agreed to by the dealer in a locations practice. As noted in Pollock, *The Schwinn Per Se Rule: The Case for Reconsideration*, 44 Antitrust L.J. 557, 570-71 (1975) the exclusive distributorship

> ". . . interferes with the manufacturer's freedom in choosing customers during the term of the agreement; 'forecloses' any other person from getting a distributorship in that territory; and 'forecloses' retailers from buying from any other distributor located in that territory. Nevertheless, as *Schwinn* itself recognizes, such a restraint is tested under the Rule of Reason, and indeed comes close to the status of per se *legality*." (footnotes omitted)[9]

Moreover, it is surely plain that both the purposes and the effects of distribution systems employing exclusive

[9] *A fortiori*, if it is lawful for a manufacturer to assure one dealer that his will be the "exclusive location" for sales of the manufacturer's products within a prescribed territory, then, surely, it is also lawful for a manufacturer to keep that commitment. And this he can only do by restricting other dealers from selling his products from locations within that territory. See Pet. App. A-38-9. As stated by former Assistant Attorney General (Antitrust Division) Donald S. Turner:

> "The point is very simple: If I set up a dealer in Baltimore and I don't want any more dealers in Baltimore, the only way I can make that stick is to tell the Washington dealer that he can't set up an establishment in Baltimore." 1968 Antitrust Law Symposium of the New York State Bar Association, 64.

dealing arrangements are substantially identical to—if not more restrictive than—those involving locations practices. The whole point of exclusives, after all, is to further interbrand competitive capabilities by providing select dealers with territories substantially insulated from intrabrand competition. While partaking of purposes similar in part, a locations practice like Sylvania's is less restrictive in effect because it entails multiple dealers in every major market area.

As *Schwinn* itself recognizes, the exclusive dealing practice is subject to the rule of reason because it, like a locations practice, can serve legitimate pro-competitive interests. While the party subject to the "restraint" might differ, Sylvania's locations practice possesses the same pro-competitive potential as "exclusives"—a potential fully realized on the evidence adduced. The mere identity of the contracting party restrained—be it manufacturer or distributor—cannot be dispositive;[10] nor can it justify review of the majority opinion below.

B. Judicial economy and stare decisis:

Petitioners berate the majority below, *inter alia*, for distinguishing *Schwinn* on a "wholly specious" factual

[10] With respect, Judge Browning's dissent ignores the reality of distributor bargaining power in its analysis of the issue. In modern American commerce retail chains often possess equal or greater bargaining power than that possessed by the manufacturer, particularly when, like Sylvania, the manufacturer is struggling to obtain a meaningful share of the market. Judge Browning—like petitioners—would derive a *per se* rule from an unsubstantiated economic model in which the manufacturer is invariably supreme in "imposing" its contractual will upon its seemingly hapless dealers. Petitioners' own conduct in the San Francisco market area, as recited in the majority opinion at Pet. App. A-8, belies the efficacy of both the model and the analysis.

basis "which is a transparent farce." Petition, pp. 16, 19. As petitioners would have it, if the literal language of *Schwinn* is capable of application to a vertical trade practice, it must be so applied—with or without economic rhyme or reason. To hold otherwise is to compel litigants to "set sail on a sea of speculation in a prophetic effort to tell whether the resulting injury is offset by asserted benefits to interbrand competition." Petition, p. 14. Thus *certiorari* should issue in order to expand and cleanse *per se* doctrine in the vertical context.

But the majority opinion below scarcely warrants the invective with which it is here greeted. Far from "rewriting the law announced by this Court" (Petition, p. 22), that opinion demonstrates a sensitive regard for the prior teachings of this Court and the appropriate economic analysis which underlies them. Its overriding focus is on the central concern of the antitrust laws, namely, whether competition will be ill or well served by the practices under scrutiny. Such a focus is mandated by *Northern Pacific Railway Co. v. United States,* 356 U.S. 1 (1958), where this Court held that a *per se* rule may be applied only after it has been found that a particular practice has a "pernicious effect on competition and lack[s] . . . any redeeming virtue". 356 U.S. at 5. Compare *White Motor Co. v. United States,* 372 U.S. 253, 262 (1963). Indeed, in *Schwinn* itself this Court, before reaching its *per se* result, stated that "our inquiry is whether, assuming nonpredatory motives and business purposes and the incentive of profit and volume considerations, the *effect upon competition in the marketplace is substantially adverse.*" 388 U.S. at 375 (emphasis added). The majority opinion simply remits the controversy to the trier of fact for such an

inquiry under instructions allowing all pertinent economic purposes and effects to be weighed.

Petitioners argue that such an inquiry should be proscribed because it is judicially difficult and inefficient. Petition, pp. 14-15. That, of course, is a traditional reason for invoking *per se* doctrine with respect to practices demonstrated to be "hard core" offenses. But whether or not a *per se* rule actually yields the asserted benefits to judicial ease and economy,[11] the interests advanced are not sufficiently weighty to justify eschewing a meaningful factual analysis of actual purposes and effects particularly when, as here, the challenged practice is demonstrably beneficial to competition. *Per se* rules ought not to be stretched beyond the competitive concerns which gave them birth and breadth. See Elman, *Petrified Opinions and Competitive Realities,* 66 Colum. L. Rev. 625, 627 (1966).

To buttress the "efficiency" concern petitioners argue that *United States v. Topco Associates,* 405 U.S. 596 (1972) "flatly rejects possible benefit to interbrand competition as a basis for sanctioning damage to intrabrand competition". Petition, p. 19. But as petitioners themselves recognize, *Topco* involved horizontal territorial and related restraints—practices with respect to which "competitive damage" is readily apparent. It is otherwise in a vertical context: when, as here, a manufacturer has joined with its distributors to form a distribution system engaged in an economic battle with competing brands, "it is myopic to concentrate only on the possible diminution of *intra*brand competition and ignore the advantages to *inter-*

[11] In the context of vertical practices it may be doubted whether such benefits actually accrue in light of the post-*Schwinn* litigation experience. See cases cited Pet. App. A-33 *et seq.*

brand competition. Elementary cost-benefit analysis would seem to require consideration of the *net* competitive effect of a vertical restriction—and not merely the effect on one side of the balance sheet." Pollock, *The Schwinn Per Se Rule: The Case for Reconsideration,* 44 Antitrust L.J. 557, 586 (1975) (emphasis in original).[12] See Pet. App. A-45-6.

Petitioners frankly recognize that their attack upon the majority opinion is based upon *per se* doctrine bereft of any reasoned economic analysis. Thus speaks the petition: "economic analysis cannot aid a court or jury to weigh asserted interbrand gains against established intrabrand losses". Petition, p. 20. That may be sound economics and good law in the horizontal context as *Topco* teaches; but the majority below properly perceives the vertical context as significantly different. Here, both the evidence at trial[13] and the most recent commentaries[14] demonstrate the appropriateness of a rule of reason inquiry.

---

[12]We respectfully add Mr. Pollock's thoughtful article to the wealth of commentaries criticizing the *Schwinn* decision, cited in the majority opinion at Pet. App. A-18, fn. 13. Throughout these proceedings Sylvania has preserved its contention that in the event its distribution practice were subject to an expanded *per se* rule of illegality derived from *Schwinn,* then *Schwinn* ought to be reconsidered. If this Court were to grant a hearing, Sylvania would urge such reexamination. In this connection see Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where,* 44 Antitrust L.J. 537 (1975).

[13]Sylvania's expert at trial, Professor Lee Preston, formerly a member of the Neal Task Force on antitrust policy under President Johnson and a consultant to the Department of Justice and Federal Trade Commission, testified that a locations restriction such as Sylvania's "has no effect on the strength of competition in the market as a whole because there are so many outlets, so many competitive alternatives throughout the market". He further testified:

> "Therefore, if this distribution policy or any particular distribution policy has the effect of strengthening Sylvania or any other smaller firm as a competitive force among the other firms in that market, many of which are larger, then I think we have to look carefully at that policy as an element in competition, indeed as a pro competitive policy among the brands and the manufacturers as a whole." See Pet. App. A-48, fn. 36.

Significantly, Continental offered no economic evidence of any kind or character during the course of trial.

[14]In addition to the articles and notes cited in the majority opinion at Pet. App. A-17, fn. 12 and A-35-6, fn. 27, see Phillips, *Schwinn Rules and the "New Economics" of Vertical Relations,* 44 Antitrust L.J. 573 (1975).

To recapitulate: the majority below correctly distinguishes the Sylvania practice from that in *Schwinn* and correctly declined to impose a *per se* rule of illegality shorn from its proper setting. Petitioners' verbal abuse of the majority opinion neither impugns its soundness nor justifies review by this Court.

II. THE OPINION BELOW DOES NOT CONFLICT WITH DECISIONS IN OTHER COURTS

With typical resort to argumentative hyperbole, petitioners assert that manufacturers and distributors participating in distribution systems throughout the country are now plagued with "confusion and doubt" as a consequence of the majority's "departure" from *Schwinn.* Petition, pp. 20-22. But the "confusion" is petitioners': for the majority opinion is consistent with every opinion of the Courts of Appeals which have considered issues of comparable character.

From *Boro Hall Corporation v. General Motors Corporation,* 124 F.2d 822 (2d Cir. 1942), *cert. denied,* 317 U.S. 695 (1943), through *Salco Corporation v. General Motors Corporation, Buick Motor Division,* 517 F.2d 567 (10th

Cir. 1975), and *Kaiser v. General Motors Corporation,* 530 F.2d 964 (3d Cir. Feb. 10, 1976), *aff'g* 396 F.Supp. 33 (E.D. Pa. 1975), the Court of Appeals have uniformly held locations practices and similar vertical distribution techniques subject to the rule of reason. The exhaustive compendium of pertinent authorities in the majority opinion below—including the remand orders in *Schwinn, Topco* and *United States v. General Motors,* 384 U.S. 127 (1966)—need not be recapitulated here. (See Pet., App.-16-44). What is incumbent, however, is a brief discussion of petitioners' treatment of three recent opinions in the Fifth, Eighth and Tenth Circuits.

(A) *Salco Corp. v. General Motors Corp.,* 517 F.2d 567 (10th Cir. 1975)

This Tenth Circuit opinion, which the court below found "virtually indistinguishable from the instant case" (Pet. App. A, p. 32) is dismissed by petitioners in terms irreconcilable with any meaningful analysis. *Salco,* we are told, holds only that

> ". . . it is lawful for a manufacturer to specify the location covered by a franchise given to a dealer. Of course it is. A manufacturer need not permit a dealer to hold itself out as the manufacturer's authorized representative at locations where the manufacturer does not wish to do so. At Sylvania's request Mr. Justice Clark instructed the jury below precisely to that effect. This case does not involve any assertion by Continental that it may hold itself out as a franchised, or authorized dealer of Sylvania at any location where Sylvania has not conferred on Continental the right to profit from Sylvania's name and good will. This case turns on a very different question—

> namely, whether a manufacturer can by agreement foreclose a retailer from shipping its own merchandise from a franchised location to a non-franchised location for resale, an issue not involved in *Salco,* but to which *Schwinn* clearly speaks. . . ." (Petition, pp. 16-17)

But the distinction thus drawn between "location franchising" and "location restrictions" is, as the majority below rather delicately put it, "highly artificial and even spurious." (Pet., App. A-30, fn.22).

Franchising by location as utilized in modern product distribution means nothing if it does not embrace the authorization to sell as a brand name dealer from a designated location. The Sylvania locations practice, like that in *Salco,*[15] was a product of agreements authorizing the dealer to sell and display products bearing the manufacturer's name. Such authorization was the primary purpose of the franchise. Indeed, it is by the dealer's sale, advertising and display of the manufacturer's line that he effectively holds himself out as an authorized dealer. See Pet. App. A-30-31, fn. 22. Continental itself recognized this truth when it requested Sylvania's formal approval of its Sacramento location as a Sylvania outlet.

Nor could it be otherwise in a merchandising world characterized by an escalating trend toward more manufacturer responsibility for the ultimate product. For the modern consumer economy demands that the manufacturer

[15]The location clause involved in *Salco* provided:
"Once dealer is established in facilities and at a location . . . mutually satisfactory to Dealer and Buick, Dealer will not move to or establish a new or different location . . . without prior written approval of Buick." 517 F.2d at 575 n.7.

assume direct responsibility for product safety and quality whether or not the manufacturer has parted with all title and dominion. For example, under California's Song-Beverly Consumer Warranty Act a manufacturer of consumer goods for which the manufacturer makes express warranties is obliged to provide sufficient service and repair facilities in the state to carry out the terms of such warranties or be liable to every retail seller of such goods who gives effect to express warranties whether or not such retailer be "franchised". See California Civil Code §1790 *et seq.*

It comes to this: in terms of the marketplace, a "location franchise" almost inevitably entails a "resale restriction" keyed to location—a restriction which springs from the notion that a manufacturer's decision to treat with a dealer in one location does not obligate it to do so in all locations.

(B) *Reed Brothers, Inc. v. Monsanto Company*, 525 F.2d 486, 500 (8th Cir. 1975), *cert. denied*, 46 L.Ed. 645 (U.S. 1976)
Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 899-901 (5th Cir. 1973)

These Eighth and Fifth Circuit decisions present variations on the traditional theme that form cannot control substance. Both hold that on the facts presented the vertical practices under scrutiny involved territorial restraints within the reach of *Schwinn*. As such, these opinions are both unexceptionable and consistent with the Ninth Circuit holding here. Indeed, these opinions exemplify the fact that when lower courts have encountered contractual

arrangements which rigidly compartmentalized territories or precluded intrabrand competition, they have applied the *Schwinn* rule. See, *e.g.*, *Adolph Coors Company v. F.T.C.*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975), and *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975). It is properly otherwise where, as with Sylvania, the purposes and effects of the challenged practice are sufficiently different to warrant further economic inquiry.

CONCLUSION

The Court of Appeals below applied proper legal standards in reversing the judgment entered in the District Court. In contrast to the initial trial, a jury may now proceed to adjudicate this controversy under rule of reason instructions. The petition fails to demonstrate any error or conflict of decision warranting review by this Court. Accordingly, it should be denied.

Dated, San Francisco, California,
August 30, 1976.

RICHARD E. GUGGENHIME
M. LAURENCE POPOFSKY
RICHARD L. GOFF
Attorneys for Respondent

HELLER, EHRMAN, WHITE & MCAULIFFE
Of Counsel